86 - 1446

No. ____-____

IN THE

Supreme Court of the United States

October Term, 1986

DELMUS PUNTON,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 5, 1987

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QUESTIONS PRESENTED

This petition for certiorari arises out of a ruling of the United States Court of Appeals for the Ninth Circuit that petitioner could not assert claims for damages and attorneys' fees under 42 U.S.C. § 1983 in federal court as a result of a prior judgment in related proceedings brought by petitioner in state court.

The questions are:

1. Whether the decision of the Court of Appeals holding that petitioner could not assert his claims under § 1983 in federal court conflicts with this Court's decision in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), and the decisions of other courts of appeals.

2. Whether the Court of Appeals, had it followed the decision in *Migra*, would have found that Washington law permits petitioner to bring a separate action for damages and attorneys' fees in federal court under § 1983.

3. Whether the Court of Appeals, if, instead of following *Migra*, found that petitioner did not state a claim under § 1983, misinterpreted prior decisions of this Court and acted in conflict with decisions in other courts of appeals.

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The petitioner Delmus Punton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B) is reported at 805 F.2d 1378.

The order of the District Court on respondent's motion for summary judgment on the ground of *res judicata* and petitioner's motion for partial summary judgment was not reported and is set forth in Appendix D. The judgment of the District Court appears in Appendix E.

Proceedings related to the federal action were begun in the City of Seattle Public Safety Civil Service Commission and reviewed in the courts of Washington State. The findings, conclusions and order of the Public Safety Civil Service Commission appear in Appendix G. The findings of fact and conclusions of law of the King County Superior Court on a writ of certiorari to the Public Safety Civil Service Commission are set out in Appendix H. The order of reinstatement of that court appears in Appendix I. The opinion of the Washington Court of Appeals reviewing the superior court decision is reported at 32 Wn. App. 959, 650 P.2d 1138, and is set forth in Appendix J. The decision of the Washington Supreme Court to deny review of the court of appeals decision is reported at 98 Wn.2d 1014, and appears in Appendix K.

JURISDICTION

The judgment of the Court of Appeals (Appendix C) was entered on December 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved are set forth in pertinent part in Appendix A. They are:

The Fifth and Fourteenth Amendments to the Constitution of the United States;

28 U.S.C. § 1331;

28 U.S.C. § 1343(a);

42 U.S.C. § 1983;

42 U.S.C. § 1988;

Revised Code of Washington § 41.12.090; and

Revised Code of Washington § 7.16.040.

STATEMENT OF THE CASE

The petitioner in this case, Delmus Punton, is an officer in the Seattle, Washington Police Department. In September 1980, he was dismissed from his job by the Seattle Police Chief. Punton was neither advised of the charges against him nor afforded a hearing before receiving his notice of dismissal.

Punton subsequently filed an appeal with the City of Seattle Public Safety Civil Service Commission. In his appeal, he contended that the failure to provide a pretermination hearing rendered his discharge constitutionally invalid. Believing, however, that its jurisdiction did not allow it to reach the constitutional question, the Commission concluded Punton's discharge was done in good faith, and for cause, and affirmed the Police Chief's decision. (Appendix G, *infra*).

Punton next sought a writ of certiorari pursuant to Wash. Rev. Code § 7.16.040 (Appendix A-10, *infra*) in King County Superior Court, again arguing that his failure to receive a pretermination hearing denied him due process. This time, the court agreed that Punton's dismissal without a hearing violated his state and federal due process rights, since the Seattle Police Manual, as well as a collective bargaining agreement, required a pretermination hearing before the implementation of disciplinary measures. (Appendix H, *infra*, H-9-11). The court ordered that Punton be reinstated in his job with back pay, and also awarded attorneys' fees. (Appendix I, *infra*).

The Commission appealed the superior court decision to the Washington Court of Appeals. That court affirmed the ruling that Punton's due process rights had been violated, again finding that the Police Manual regulations granted a substantive right to a pretermination hearing. (Appendix J, *infra*, J-21-22). The award of attorneys' fees, however, was reversed. In making the latter ruling, the court stated that

proceedings pursuant to a writ of certiorari are limited in scope and may only secure the type of relief within the jurisdiction of the original tribunal, here the Public Safety Civil Service Commission. The court thus ruled that since the commission lacked the authority to award attorneys' fees, the superior court likewise had no power to award any fees. (*Id.* at J-24-26). Review of the court of appeals decision was denied by the Washington Supreme Court. (Appendix K, *infra*).

While his case was pending in the Washington Court of Appeals, Punton filed an action in federal district court against respondent under 42 U.S.C. §§ 1983 and 1988 (Appendix A-5, *infra*) asserting violations of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. (Appendix A-1-2, *infra*). Punton sought damages for emotional distress resulting from the violation of his due process rights, as well as attorneys' fees. Jurisdiction of the district court over this claim was invoked under 28 U.S.C. §§ 1331 and 1343(a). (Appendix A-3-4, *infra*).

After the Washington Court of Appeals decision, Punton moved for partial summary judgment on the ground that collateral estoppel prevented respondent from relitigating any question of liability under § 1983. Respondent filed a cross motion for summary judgment, contending that the state court judgment barred Punton under *res judicata* principles from bringing his action in federal court.

The District Court held that *res judicata* did not preclude Punton from litigating his claims for emotional distress damages and attorneys' fees in federal court since the courts in the state proceedings did not have jurisdiction to award those remedies. The court stated:

> Pursuant to its statutory authority, the Seattle Civil Service Commission . . . did not have jurisdiction to award attorneys' fees or damages other than reinstatement of

> back pay. Under a writ of certiorari, the King County Superior Court acted as an appellate court and only had the jurisdiction of the tribunal below . . . As such, the doctrine of *res judicata* does not preclude the plaintiff from litigating those claims for relief which the commission was without jurisdiction to remedy . . . .

(Appendix D, *infra*, D-3-4).

The court also ruled that respondent was precluded from relitigating the state court findings that it had violated Punton's constitutional rights. (Appendix D, *infra*, D-4).

Subsequently, a jury awarded Punton $150,000 in damages. (Appendix E, *infra*). The court awarded an additional $15,000 in attorneys' fees.

Respondent filed an appeal with the Ninth Circuit, arguing that Punton's action was barred by *res judicata*. Respondent did not appeal the District Court ruling that it was collaterally estopped from relitigating the question of liability. (Appendix F, *infra*, F-3). Punton cross-appealed from the denial of additional attorneys' fees.

A divided Court of Appeals reversed the district court judgment. (Appendix B, *infra*). The court initially acknowledged that in § 1983 cases a prior state court judgment has the same claim preclusive effect that the judgment would have in the courts of the state in which it was brought, citing *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). After a brief review of Washington law on this issue, however, the court abruptly shifted its line of reasoning and stated that the crucial question for it to decide was "whether Punton, who after losing his job, obtained the relief afforded by the law that created his job, is now entitled to additional relief in federal court under § 1983, under the type

of procedure that he chose to follow." (*Id.* at B-10—11) (footnote omitted). In undertaking this new analysis, the court considered two issues:

> (1) is post-deprivation process the equivalent of due process in a given case?; and (2) how does the adequacy of the state's choice of remedy bear upon (1)?

(*Id.* at B-11).

After analyzing the remedy received by petitioner in the state proceedings, the court concluded:

> It does appear . . . that Punton decided at some point, while waiting for further proceedings in the state courts, to seek more lucrative relief in federal court. We have found no Supreme Court case holding that merely because litigation strategy and the perceived advantages of a more adequate award in federal court make it an attractive alternative, a person aggrieved by official state action can abandon a remedy that colorably satifies due process of law in the state court after recovering substantially what he has lost.

(*Id.* at B-21). The court thus never actually applied the analysis required by *Migra*; instead, it apparently re-opened the issue of liability not appealed by respondent to hold that petitioner failed to state a viable claim under § 1983.

In dissent, Judge Norris limited himself to the issue actually presented on appeal, whether *res judicata* precluded petitioner's federal claims. (*Id.* at B-25-27). He concluded that, applying the analysis dictated by the court in *Migra*, Punton was not barred by Washington *res judicata* law from bringing a § 1983 action for emotional distress damages and fees in state court. As a result, Judge Norris found that under *Migra* petitioner should have been afforded the opportunity to pursue those remedies in federal court. (*Id.* at B-36).

REASONS FOR GRANTING THE PETITION

The court below, in ruling that petitioner could not assert his claims under 42 U.S.C. § 1983 in federal court, has decided an important federal question in a way that conflicts with the decision of this Court in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), as well as with decisions of other courts of appeals that have ruled on the same question. If this decision is allowed to stand, it will cause a great deal of confusion about litigants' rights under § 1983, and could severely restrict the right of plaintiffs who have suffered a deprivation of their constitutional rights to sue in federal court. Because of the importance of this issue, and because of the conflict of the Ninth Circuit's decision with *Migra*, this court should exercise its discretion and grant the petitioner review on certiorari.

1. The decision of the Court of Appeals in this case conflicts with this Court's decision in *Migra*, as well as with decisions in other courts of appeals.

In *Migra*, the petitioner initially brought suit in Ohio state court for breach of contract and wrongful interference with her contract of employment as a supervisor of elementary education. The court ruled in favor of petitioner on her breach of contract claim, reinstating her to her former position and awarding compensatory damages. Petitioner then dismissed her other claims without prejudice, and filed suit in federal court under § 1983 claiming, *inter alia*, violations of her right to due process. The complaint sought both injunctive relief and compensatory and punitive damages. Defendants in the federal action argued that *res judicata* barred petitioner's federal claims. The district court dismissed the complaint, and the court of appeals affirmed.

This Court, however, vacated the decision of the court of appeals, holding that "petitioner's state court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts." *Id.* at 85. This Court thus remanded the case for a determination of whether Ohio law precluded petitioner's federal claims. *Id.* at 87.

The issue decided by *Migra* is identical to the issue presented on appeal to the Ninth Circuit in this case: whether state law bars petitioner from bringing an action in federal court under § 1983 for damages and attorneys' fees because of prior proceedings brought by petitioner in state court. (*See* Appendix F, *infra*). Instead of pursuing a *Migra* analysis, however, the Court of Appeals stated that the central issue before it was "whether or not Punton is *entitled* to something more (than the remedies received in state court) and, if so, what more." (Appendix B, *infra*, B-11) (emphasis supplied). This is a severe mischaracterization of *Migra*. What must be decided is not whether petitioner is "entitled" to additional relief, but whether Washington state law *permits* him to bring a separate action for damages and attorneys' fees under § 1983.

The Court of Appeals then concluded that because the remedy accorded Punton in state court "colorably" satisfied due process, he was not able to pursue additional relief under § 1983 in federal court "merely because litigation strategy and the perceived advantages of a more adequate award in federal court make it an attractive alternative." (*Id.* at B-21). This conclusion is clearly foreclosed by this Court's decision in *Migra*. The fact that petitioner's § 1983 claim asserts the violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution (Appendix A-1-2, *infra*) should not be significant, for the petitioner in *Migra* also asserted such claims. It should also

not matter that Punton received reinstatement and compensatory damages in state court, for the petitioner in *Migra* also received such relief in state court. Simply put, what the *Migra* holding teaches is that in deciding whether a § 1983 action is precluded by prior state court proceedings, the court should look to whether state law requires preclusion of those claims. This is what the Court of Appeals was required to decide, but did not decide, in the present case.

As might be expected, the decision of the Court of Appeals in this case conflicts with a number of other court of appeals decisions on this question. In *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986), a state prisoner brought a § 1983 action for damages asserting a deprivation of due process rights. This complaint alleged the same factual circumstances which had given rise to an action brought earlier in New York state court under a procedure known as an "Article 78 proceeding." Defendants claimed the federal action was barred by *res judicata*. The Second Circuit recognized that the question squarely before it was "whether under New York law the judgment in an Article 78 proceeding precludes a later civil rights claim for damages based on the same underlying facts." *Id.* at 277. After performing this analysis, the Second Circuit concluded that under New York law the plaintiff's § 1983 claim was not barred, and remanded the case for further proceedings. *Id.* at 282.

Similarly, in *Duncan v. Peck*, 752 F.2d 1135 (6th Cir. 1985), the plaintiff brought an action in federal court seeking compensatory and punitive damages under § 1983 for the deprivation of his property without due process after defendants had secured a default judgment against him in Ohio state court. The district court ruled the action was barred by *res judicata*. On appeal, the Sixth Circuit stated:

> [*Migra*] requires a federal court to give a prior state court judgment the same preclusive effect in subsequent section 1983 litigation as it would be given under the law of the state in which the judgment was rendered.

Id. at 1139. After applying this rule, the Sixth Circuit found that under Ohio law, the two suits were not based on the same cause of action, and remanded the case to the district court. *Id.* at 1142.

A number of other courts of appeals have also applied the analysis set out in *Migra* to determine whether an action under § 1983 is barred by a prior state court judgment. *See, e.g., Morgan v. City of Rawlins*, 792 F.2d 975 (10th Cir. 1986). Even the Ninth Circuit in *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986), in determining the issue of claim preclusion where the plaintiff had brought claims under § 1983, acknowledged that "There is no dispute that (state) law determines whether Norco's . . . federal causes of action are barred as *res judicata*," citing *Migra*.

By way of contrast, only two appellate court decisions were cited by the Ninth Circuit in support of its decision. In one of them, *Clark v. Yosemite Community College District*, 785 F.2d 781 (9th Cir. 1986), the court explicitly applied the *Migra* analysis the Court of Appeals should have used in the present case, examining California law to determine if plaintiff's § 1983 action was barred by a prior mandamus action in state court. The other case cited, *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984), is not on point. In that case, the remedies sought by the plaintiff were initially (and mistakenly) denied in state proceedings. Instead, however, of appealing that decision through the state system, the plaintiff brought an action in federal court under § 1983 seeking the same remedy he had been denied in the state proceedings. The court held that

"substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary." *Id.* at 86. This case is clearly distinguishable from the present one, where petitioner's state claims were fully litigated, and where the sole question presented is whether petitioner may seek additional relief not available in the state proceedings by pursuing an action in federal court under § 1983.

It is therefore clear that the decision of the Court of Appeals, by failing to apply Washington state law to determine whether the petitioner's § 1983 claims are barred by a prior state court judgment, conflicts with this Court's decision in *Migra*, as well as with the decisions in other courts of appeals.

2. Had the Court of Appeals examined state law as required by *Migra*, it would have found that Washington law permits petitioner to bring a separate § 1983 action in federal court.

Petitioner's claim in state court was brought under a procedure created by statute known as a "writ of certiorari." In proceedings pursuant to the writ, the trial judge acts as an appellate court reviewing the propriety of administrative action. *Punton v. City of Seattle Public Safety Commission*, 32 Wn. App. 959, 969, 650 P.2d 1138, 1144 (1982), *petition for review denied*, 98 Wn.2d 1014 (1983). (Appendix J, *infra*, J-24) Under Wash. Rev. Code § 7.16.040, the relief granted under the writ may only be that which is necessary to set aside action in excess of "the jurisdiction of [the] tribunal, board or officer, or [is illegal] or a proceeding not according to the course of the common law." (Appendix A-10, *infra*). Because under Wash. Rev. Code § 41.12.090 (Appendix A-6-10, *infra*), the jurisdiction of the Seattle Public Safety Civil Service Commission is limited to whether the discharge "was made in good

faith for cause," and because remedies under the statute are limited to reinstatement and back pay, petitioner was unable to bring his §§ 1983 and 1988 claims for emotional distress damages and attorneys' fees in the state court proceeding. *See Punton*, 32 Wn. App. at 970, 650 P.2d at 1144 (Appendix J, *infra*, J-25); *Bringgold v. City of Spokane*, 19 Wash. 333, 53 P. 368 (1898).

It is well settled under Washington law that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 226, 588 P.2d 725, 728 (1978). As the court stated in *State ex. rel. Hamilton v. Cohn*, 1 Wn.2d 54, 59-60, 95 P.2d 38, 41 (1939):

> A judgment is not conclusive . . . on any point or question which, from the nature of the cause, the form of the action, or the character of the pleadings, could not have been adjudicated in the action in which it was rendered, nor as to any matter which must necessarily have been excluded from consideration.

Thus, because of the limited nature of the writ of certiorari proceedings, Punton would not be precluded from bringing a separate action in state court for damages other than back pay, and for attorneys' fees. *See Standow v. Spokane*, 88 Wn.2d 624, 564 P.2d 1145, *appeal dismissed*, 434 U.S. 992 (1977) (party may file action for damages and yet not be precluded from relief by certiorari). Accordingly, applying the rule established in *Migra* to the facts of this case, petitioner is not precluded from bringing his § 1983 action in federal court.

3. If the Court of Appeals, instead of following *Migra*, ruled that petitioner did not state a claim under § 1983, the decision of the court misinterprets a prior decision of this Court and conflicts with applicable decisions of other courts of appeals.

In reaching its decision, the Court of Appeals may have reached an issue not even raised by respondent on appeal and concluded that under *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny, petitioner did not state a claim for relief in federal court under § 1983. Such a holding, however, would misinterpret *Parratt*, and would be inconsistent with subsequent decisions of other courts of appeals.

In *Parratt*, a prison inmate sued under § 1983, claiming that prison employees negligently lost hobby materials he had ordered. This Court held that state tort remedies were "sufficient to satisfy the requirements of due process" and denied the claim. *Id.* at 544. In its decision, this Court noted that in some cases a predeprivation hearing has been required:

> In some cases, this Court has held that due process requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases . . . the deprivation of property was pursuant to some established state procedure and 'process' could be offered before any actual deprivation took place.

Id. at 537. This Court found, however, that in "a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee . . . it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 541.

Subsequently, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court clarified the *Parratt* decision, reaffirming that "absent the necessity of quick action by the State or the impracticality of providing any predeprivation process, a post-deprivation hearing here would be constitutionally inadequate." *Id.* at 436 (citations omitted). Moreover, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court ruled that plaintiffs, who were terminated public employees, had stated viable § 1983 claims on their right to a pretermination hearing notwithstanding the availability of state judicial review of adverse Civil Service Commission findings.

There is thus nothing in *Parratt* which suggests that when, as in petitioner's case, a pretermination hearing is required, there is nevertheless no "deprivation" in a constitutional sense as long as the state provides some forum for constitutional redress; in fact, there is considerable authority in the courts of appeals directly to the contrary. For example, in *Stana v. School District of City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), the Court of Appeals reversed a district court dismissal of a § 1983 action alleging violations of due process brought by an applicant for a city teaching position. The court noted this situation was not the type of "random and unauthorized act by a state employee" presented in *Parratt*, when the state could not predict where the deprivation of property would occur. Rather, since it was in a position to know the deprivation was about to occur, a pretermination hearing was neither impracticable nor impossible. *Id.* at 129-30. The court concluded:

> "[since] the governmental entity could have, but did not, provide predeprivation procedures, a § 1983 action complaining of the lack of procedural due process may be maintained in federal court, notwithstanding the availability of state judicial routes as well." *Id.* at 130.

See also Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985); *Findeisen v. North East Independent School District*, 749 F.2d 234 (5th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

On the other hand, there was only one other decision cited in this case by the Court of Appeals other than *Parratt* which could support a ruling on this basis. *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984). In *Cohen*, the court held that substantive mistakes by administrative bodies do not create a federal claim so long as correction is available in the state courts. *Id.* at 86. However, this decision has been severely limited, if not totally repudiated, in several subsequent Third Circuit opinions because of its inconsistency with this Court's decision in *Loudermill*. *See Stana*, 775 F.2d at 129-30; *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986).

As a result, any use by the Court of Appeals of a *Parratt* analysis is totally inappropriate under the circumstances of the present case. As in *Stana*, the violation of petitioner's due process rights was not a "random and unauthorized act" of the type found in *Parratt*, since Seattle Police Manual regulations accorded Punton the right to a pretermination hearing. *See Punton v. City of Seattle Public Safety Commission*, 32 Wn. App. at 969, 650 P.2d at 1143. (Appendix J, *infra*, J-21-22). Rather, the proper analysis for the Court of Appeals was to determine under *Migra* whether Washington *res judicata* law bars petitioner from bringing his § 1983 claim. Any reliance by the Court of Appeals on *Parratt* or its progeny seriously misconstrues the teachings of this Court, and is in conflict with the rulings of other courts of appeals.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for certiorari should be granted. In the alternative, it is respectfully requested that this Court reverse and remand this case to the United States Court of Appeals for the Ninth Circuit for a determination of whether Washington law bars petitioner's § 1983 action pursuant to this Court's decision in *Migra*. *See* 465 U.S. at 87.

Respectfully submitted this 5th day of March, 1987.

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APPENDIX A

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Sec. 5. Power to enforce amendment. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation,

custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988. Proceedings in vindication of civil rights

In any action or proceeding to enforce a provision of [section 1983 of this title,] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Wash. Rev. Code § 41.12.090 Procedure for removal, suspension, demotion or discharge - Investigation - Hearing - Appeal. No person in the classified civil service who shall have been permanently appointed or inducted into civil service under provisions of this chapter, shall be removed, suspended, demoted or discharged except for cause, and only upon written accusation of the appointing power, or any citizen or taxpayer; a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended, demoted or discharged may within ten days from the time of his removal, suspension, demotion or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of

the question of whether such removal, suspension, demotion or discharge was or was not made for political or religious reasons and was or was not made in good faith [f]or cause. After such investigation the commission may affirm the removal, or if it shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement of [or] reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted or discharged, which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. The commission upon such investigation, [in] lieu of

affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay; the findings of the commission shall be certified, in writing to the appointing power, and shall be forthwith enforced by such officer.

All investigations made by the commission pursuant to the provisions of this section shall be had by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal

therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he resides. Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. The commission shall, within ten days after the filing of such notice, make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner: Provided, however, That such hearing shall be confined to the determination of

whether the judgment or order of removal, discharge, demotion or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.

Wash. Rev. Code § 7.16.040 Grounds for granting writ. A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

APPENDIX B

Delmus PUNTON,
Plaintiff-Appellee/Cross-Appellant,

v.

The CITY OF SEATTLE,
Defendant-Appellant/Cross-Appellee.

Nos. 83-3890, 83-4132.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 8, 1984.

Submission Vacated Jan. 17, 1985.

Resubmitted May 5, 1986.

Decided Dec. 9, 1986.

GOODWIN, Circuit Judge:

The City of Seattle appeals from a district court judgment for money damages, assigning error to the denial of its motion to dismiss Punton's 42 U.S.C. § 1983 claim on the basis of the res judicata effect of a prior state court judgment. Punton v. City of Seattle Public Safety Commission, 32 Wash.App. 959, 650 P.2d 1138 (1982), cert. denied,

98 Wash.2d 1014 (1983). Punton cross-appeals, challenging the district court's refusal to grant him the full amount of attorneys' fees requested pursuant to 42 U.S.C. § 1988.

In September 1980, Punton, an officer of the Seattle Police Department, was dismissed from his job for conduct unbecoming an officer, disobedience of a superior's order, allowing unauthorized persons to ride in his patrol car and other infractions of department rules. Punton was not advised of the charges against him or afforded a hearing at any time prior to receiving his notice of dismissal.

Shortly after his dismissal, Punton filed an appeal with the Seattle Public Safety Civil Service Commission. He argued that the department's failure to provide a pretermination hearing rendered his discharge constitutionally invalid.

The commission did not reach the constitutional question. Believing its jurisdiction to be "confined to the determination . . . whether [the] removal, suspension, demotion or discharge was made in good faith," the commission affirmed the dismissal.

Punton then sought a writ of certiorari in King County Superior Court pursuant to Wash.Rev.Code. Ann. § 7.16.040 (1961).[1] He again alleged that his discharge "was not in good faith, nor for

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[1] Section 7.16.040 states:

> A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

cause, nor in conformance with due process."

The superior court concluded that dismissal without a hearing violated Punton's state and federal due process rights. Punton did not seek general damages. The court ordered Punton's reinstatement with back pay and awarded Punton attorneys' fees.

The commission appealed from the superior court to the Washington Court of Appeals. The court of appeals affirmed Punton's reinstatement, agreeing that there had been a due process violation. The appellate court, however, reversed the award of attorneys' fees. The court stated that proceedings pursuant to a writ of certiorari are limited in scope and may only "secure the rendition of 'the judgment which should have been rendered by the lower tribunal.'" Punton v. City of Seattle Public Safety Commission, 32 Wash.

App. 959, 970, 650 P.2d 1138, 1144 (1982) (quoting Bringgold v. City of Spokane, 19 Wash. 333, 336, 53 P. 368, 369 (1898)), cert. denied, 98 Wash.2d 1014 (1983). Thus, the court concluded, "the relief granted under the writ may be only that which is necessary to set aside action in excess of 'the jurisdiction of [the] tribunal, board or officer, or [is illegal]' (sic) or to 'correct any erroneous or void proceeding, or a proceeding not according to the course of the common law.'" Id. (quoting Wash.Rev.Code § 7.16.040). The court held that because the commission lacked authority to award attorneys' fees, the superior court "likewise lacked jurisdiction in a certiorari proceeding to award fees." Id.

While awaiting the decision of the Washington Court of Appeals, Punton filed this action in the United States District Court for the Western District of

Washington. Once again, Punton alleged that his dismissal violated his due process rights. In federal court Punton sought damages for emotional distress resulting from the city's alleged violation of his constitutional rights, and attorneys' fees under 42 U.S.C. § 1988, relief he had neither sought nor received in the state court proceedings. Upon receiving the decision of the Washington Court of Appeals, Punton moved for partial summary judgment in the district court. He asserted that collateral estoppel, based upon the state court determination that his due process rights had been violated, prevented the city from relitigating any question of liability, and that only damages remained to be assessed. The city also moved for summary judgment, contending that the state court decision, having granted Punton all the relief to which he was entitled under state law,

barred the federal action under the doctrine of res judicata. The district court granted Punton's motion and denied the city's motion. Subsequently, a jury awarded Punton $150,000 for mental suffering, and the court added an award of $15,000 in attorneys' fees. Punton cross-appeals from the denial of additional attorney fees.

We turn first to the city's appeal. As already indicated, the city contends that Punton's action was barred by the doctrine of res judicata.

In cases brought pursuant to 42 U.S.C. § 1983, a prior state court judgment has the same claim preclusive effect that the judgment would have in the courts of the state in which it was rendered. Migra v. Warren City School District Board of Eduction, 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984).

Under Washington law, clearly those claims which were actually litigated in the earlier proceeding are barred. Seattle-First National Bank v. Kawachi, 91 Wash.2d 223, 226, 588 P.2d 725, 727 (1978). The district court was of the opinion that Punton's claim for general damages for emotional suffering could have been litigated in state court by joining it with his civil service proceeding even though the kind of review (certiorari) provided for those disappointed in the result of the civil service proceeding is very narrow. See Standow v. City of Spokane, 88 Wash.2d 624, 632, 564 P.2d 1145, 1150 (1977). The Washington Court of Appeals in Punton v. City of Seattle Public Safety Commission, 32 Wash.App. 959, 650 P.2d 1138, 1140-41 (1982), cert. denied, 98 Wash.2d 1014 (1983), implied that certiorari proceeding is a "special" form of action that is sharply limited in

scope. The court, however, did not discuss the possibility of joinder and combination of claims in the superior court.

While we agree with the district court that Punton's federal claim was not barred by a requirement of exhaustion of state remedies, Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), it does not necessarily follow that Punton still had a viable § 1983 claim after he was reinstated in his job with back pay through state court action.

Punton's federal constitutional right was a right to not be deprived of property without due process of law. Tenured public employment has been held to be a species of property for § 1983 purposes. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971).

Punton's right to tenure and right to redress for wrongful termination were both created by state law. In this case, the undisputed facts are that Punton lost his job without any kind of a hearing. He immediately complained, received a civil service hearing, and in due course was reinstated with back pay. By resorting to post-deprivation state court process, he received everything he had lost, but he did not receive supplemental damages for emotional distress or attorney fees. The crucial question, therefore, is whether Punton, who after losing his job, obtained the incidental relief afforded by the law that created his job, is now entitled to additional relief in federal court under § 1983, for damages not available in state court under the type of procedure that he

chose to follow.[2] In short, the question properly before the district court was whether or not Punton is entitled to something more and, if so, what more.

In analyzing the probable intent of Congress in creating a federal remedy for the denial of constitutional rights without due process of law by state officials acting under color of state law, we look at two facets of the problem: (1) is post-deprivation process the equivalent of due process in a given case? And, (2) how does the adequacy of the state's choices of remedy bear upon (1)? We know that Congress intended to afford a federal

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[2] We are limited by the briefs and records in the case before us. It is not clear whether Punton could have combined all elements of his present claim in state court proceedings as was said to be the case in Clark v. Yosemite Community College District, 785 F.2d 781 (9th Cir. 1986).

remedy in some cases. But is the federal remedy under § 1983 intended to be a supplemental tort remedy for those victims of state government blunders who receive a remedy at law in the state where the wrong occurred, but who want a better remedy in the federal courts?

If the question were one of first impression it would be difficult to say that Congress intended § 1983 to afford a supplemental remedy for all state and municipal property or liberty grievances in which state remedies were available but were deemed by the injured party to be inadequate. The Supreme Court has said that § 1983 is not a general tort relief statute imposing liability on state and local governments for the blunders of their employees. Daniels v. Williams, __ U.S. ___, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). On the other hand, history teaches that the theoretical possibility

of a state court remedy does not always afford realistic protection for civil rights. A multitude of federal cases testify that a federal remedy has often been necessary to awaken state and local governments to their responsibilities toward those under their protection. See, e.g., Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

On a case-by-case basis, the courts have evolved a doctrine that one who is deprived of a fundamental liberty or property interest by state action must be afforded a remedy, either through due process of law before the deprivation, or through some kind of process afterward that approximates due process. See, e.g., Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc) cert. denied sub nom. Cranke v. Haygod, __ U.S. ___, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986), and cases collected therein. In Haygood, the

interest infringed was a liberty interest, and by the time Haygood received a hearing and a remedy in the state courts, he had been kept in prison some 17 months after his keepers knew, or should have known, that he was claiming a right, as a matter of law, to be released. We held that the release, belatedly, after a hearing, did not bar his resort to federal court for the additional remedy of damages and attorneys' fees.

In the case at bar, Punton complained after he had lost his job without a hearing, in circumstances in which the City's own regulations required a hearing, and in due course he was reinstated in his job with back pay. He says that he was not able to litigate in state courts his claim for emotional suffering because the only process available to him was limited to reinstatement and back pay. The district court disagreed, but held that

exhaustion of state remedies was not required.

Punton's case is analogous to that of an injured workman in an industrial plant covered by compulsory workmen's compensation who collects his statutory compensation and then looks around for someone to sue for additional damages for mental suffering, loss of consortium, and the like. The injured workman sometimes can find a third party who supplied an appliance or who otherwise may be sued for damages, but he is barred by the claim preclusion feature of the local compensation law from relitigating his own employers' liability. Here there is no third party with a deeper pocket. Punton is looking for supplemental relief in another judicial system.

Punton's election to proceed initially in the state court amounted to a splitting of his cause of action as well as an

election of remedies. At the start, he could have proceeded directly in federal court with a § 1983 claim for reinstatement, back pay, and general damages. Instead, he first chose to seek the relief of reinstatement and back pay in the state court. He also sought this relief in a concurrent action in federal court. The result of these dual proceedings was to create a narrow issue preclusion advantage in federal court with respect to the issue of the wrongfulness of the city's termination of his employment.

Punton now represents that he could not have litigated his § 1983 claim in the state court, and therefore his § 1983 claim cannot be barred by the claim preclusion effect of his partial recovery under the state judgment. His point does not necessarily follow.

In is highly unlikely that Congress intended to permit state court vindication

of state created property interests to set up offensive collateral estoppel for federal claims brought pursuant to § 1983. Washington state law created both Punton's job and the civil service review which he employed to get his job back, with back pay. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), a bus mechanic and security guard were dismissed under a civil service system which, unlike Seattle's, provided no pretermination hearing. The Supreme Court held that a balancing of the interests involved required some form of pretermination hearing, a matter provided for by Washington's law in this case. In contrast, Punton is not claiming solely that Washington law denied him a pretermination hearing. He is claiming that the officials charged with carrying out the law deprived him of a pretermination hearing

and that when he carried his complaint through post-termination process, the remedy he received was not adequate because it did not include emotional distress damages and attorney fees.

We recently held in an employment grievance case originating in California that claim preclusion arising from a state court mandamus action in which substantial but incomplete relief was granted barred relitigation of the claim in federal court under § 1983. Clark v. Yosemite Community College District, 785 F.2d 781 (9th Cir. 1986). In Clark, a faculty member brought mandamus to vindicate employment rights (to be free from administrative harassment and the placemnt of defamatory information in his personnel files). Because California law permits the joinder of claims arising out of the federal constitution with mandamus claims, we held that Clark was precluded from splitting his

claims into state and federal segments and litigating his federal claims in federal court after successfully pressing his mandamus claims in state court. Id. at 786-87.

Another instructive case is that of a police officer in Philadelphia who was charged with a crime, discharged from his job, acquitted after trial, and upon application to the municipal Civil Service Commission, reinstated without back pay. Cohen v. City of Philadelphia, 736 F.2d 81 (3rd Cir.1984). The commission found that whether or not Cohen had participated in the burglary for which he was acquitted, he had violated police department rules by lending money to a superior officer. Cohen thereupon sued in federal court, alleging a § 1983 claim. Summary judgment for the city was affirmed on the basis of claim preclusion. The Third

Circuit held that Cohen's claim of deprivation had been partially litigated in the state administrative system, and that had he wished to do so, he could have appealed for additional relief through the state court system. Because he chose to accept the partial remedy granted by the state court and then move over to federal court, the court held that he had not been deprived by the state defendants of his property without due process of law. Citing Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the court held that where the state would have provided adequate post-deprivation relief had Cohen chosen to pursue it, the state had not denied him due process of law. The court noted that it was not adopting an exhaustion-of-state-remedies rule, but rather that it was holding that a state has not deprived its inhabitants of due process of law in cases in which the

plaintiff has made an election to avail himself of a state remedy and then abandoned it when the state courts were still open. Cohen, 736 F.2d at 86-87.

It is not necessary in this case to decide how far we might be willing to march to the drum of the Third Circuit if we were faced with another case on all fours with Cohen. It does appear, however, that Punton decided at some point, while waiting for further proceedings in the state courts, to seek more lucrative relief in federal court. We have found no Supreme Court case holding that merely because litigation strategy and the perceived advantages of a more adequate award in federal court make it an attractive alternative, a person aggrieved by official state action can abandon a remedy that colorably satisfies due process of law in the state court after recovering substantially what he has lost. On the

contrary, Migra v. Warren City School District Board of Education, 465 U.S. at 85, 104 S.Ct. at 898, instructs to the contrary.

The judgment of the district court is reversed with neither party to recover costs in this court.

The cross-appeal is dismissed as moot.

NORRIS, Circuit Judge (dissenting):

The question presented by the City's appeal concerns the preclusive effect of a final Washington state court judgment reinstating Delmus Punton as a Seattle police officer and awarding him back pay because the Seattle Police Departme[illegible] denied Punton due process by firing him without a pretermination hearing. Punton v. City of Seattle Public Safety Commission, 32 Wash.App. 959, 650 P.2d 1138 (1982), cert. denied, 98 Wash.2d 1014

(1983). More specifically, the question is whether the Washington state court judgment precludes Punton from bringing a separate § 1983 action to recover his damages for pain and suffering and his attorney's fees.

For reasons that are obscure, the majority disposes of this appeal on the ground that the City did not deny Punton due process. Thus the majority decides the merits of Punton's constitutional claim without determining the preclusive effect of the contrary state court judgment.[1] I find this peculiar for

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[1] Admittedly, the opinion's organizational and analytical confusion makes it difficult to characterize succinctly the majority's reasoning. The majority seems initially to engage the res judicata issue, citing Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) and noting it must focus on Washington state law. Ante, at 1380. Yet the majority then shifts its focus to the merits of Punton's claim, rephrasing the central question as whether "Punton still had a

several reasons: First, concerns for judicial economy and restraint counsel us to address threshold preclusion issues before reaching the merits of a claim, especially a constitutional one. Second, the City has not appealed the district court's summary judgment ruling in Punton's favor that the state court

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[1] cont.

viable § 1983 claim after he was reinstated in his job with back pay through state court action." Ante, at 1380. After referencing Supreme Court § 1983 jurisprudence and speculating as to probable congressional intent, the majority concludes that having "obtained the incidental relief afforded by the law that created his job, [Punton is not] now entitled to additional relief in federal court under § 1983. . . ." Ante, at 1380.

The majority's failure to properly focus on the res judicata issue is further evidenced by the fact that neither of the two cases specifically relied upon by the majority applied Washington state law as the majority concedes is required under Migra. See Clark v. Yosemite Community College District, 785 F.2d 781 (9th Cir. 1986) (applying California law) and Cohen v. City of Philadelphia, 736 F.2d 81 (3rd Cir. 1984) (applying Pennsylvania law).

judgment bars the City from relitigating the merits of the due process question in this federal action. Third, second-guessing the Washington Court of Appeals' decision that Punton was denied due process contravenes the principle of "comity between state and federal courts that has been recognized as a bulwark of the federal system." Allen v. McCurry, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); cf. Younger v. Harris, 401 U.S. 37, 43-45, 91 S.Ct. 746, 750-751, 27 L.Ed.2d 669 (1971).

Rather than revisiting the merits of the due process question in this dissent,[2] I address the sole question

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[2] I note, however, that the majority's analysis is quite troublesome in several respects. First, the majority reaches its conclusion that a post-deprivation remedy constitutes all the process that is due without conducting the balancing test required by Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494

properly presented by the City's appeal: whether the state court judgment reinstating Punton as a police officer and awarding him back pay bars him from claiming damages for pain and suffering and attorney's fees in a separate § 1983

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2 cont.

(1985) (balancing the private interests in retaining employment, the governmental interest in expeditious terminations, and the risk of erroneous terminations). The Court in Loudermill found some measure of pretermination process required before a public security guard could be terminated, despite the availability of post-deprivation remedies.

Second, while the majority recognizes it must consider "how does the adequacy of the state's choices of remedy bear upon" whether the state's post-deprivation process is fully "adequate" to satisfy due process requirements, ante at 1381, the majority never engages in such an analysis. A federal court must do far more than offhandedly assert that "a remedy . . . colorably satisfies due process," ante, at 1383 (emphasis added), to ensure that a state post-deprivation remedy is truly adequate before invoking Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), to bar a § 1983 action.

action. The claim preclusive effect of a prior state court judgment in a federal § 1983 action is, of course, determined by reference to state preclusion law. Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).[3]

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[2] cont.

Finally, if the majority means to suggest that Washington provides an adequate post-deprivation remedy simply because Punton could have raised a § 1983 action during or subsequent to his state court proceeding, then despite its protest to the contrary, the majority is indeed imposing an exhaustion of state remedies requirement. Under the majority's analysis litigants could never bring a § 1983 action in federal court until they first had asserted the same action in state court. This, of course, is not the law. See Patsy v. Board of Regents of Florida, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

[3] The majority's statement that "It is highly unlikely that Congress intended to permit state court vindication of state created property interests to set up offensive collateral estoppel for federal claims brought pursuant to § 1983," ante, at 1382, is misguided for two reasons. First, in Allen v. McCurry, 449 U.S. 90,

At first blush, it would seem that elementary principles of res judicata

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[3] cont.

101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court held that Congress' clear intent in enacting the federal full faith and credit statute, 28 U.S.C. § 1738, was that "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." Migra, 465 U.S. at 83, 104 S.Ct. at 897. The Court has never suggested that § 1738 incorporates state collateral estoppel law for defensive but not offensive purposes, and such an interpretation would be at odds with the legislative history discussed in McCurry and Migra.

Second, the majority's concern with offensive collateral estoppel is misplaced because no question of offensive collateral estoppel is before us for decision. The only preclusion argument made by the City on appeal is that Punton's federal court action is barred by the state court judgment, an affirmative defense based on res judicata. The only party to invoke offensive collateral estoppel in this litigation is Punton. The district court agreed with Punton that the City was precluded under Washington law from relitigating the merits of the due process question once the Washington Court of Appeals decided that issue in Punton's favor. The City has not appealed this application of offensive collateral

would bar Punton from bringing a separate action to seek relief over and above the relief he was awarded in his successful action against the City. Punton contends, however, and the district court below agreed, that he is not barred under Washington law from bringing an independent action to recover general damages and fees for his wrongful dismissal after winning reinstatement and back pay. This counterintuitive argument is based upon the limited jurisdiction enjoyed by the Washington superior court when reviewing the Seattle Safety Commission's decision that Punton had not been wrongfully

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[3] cont.

estoppel by the district court in granting Punton partial summary judgment. The majority's gratuitous comment casting doubt on Punton's collateral estoppel argument suggests once again that the majority's decision is driven, not by Washington res judicata law, but by its antipathy towards the merits of Punton's due process claim.

terminated. Punton claims that the superior court's jurisdiction was limited to awarding him reinstatement and back pay for two reasons: First, the court could grant him only that relief which the administrative tribunal was authorized to provide, and second, the court could not entertain evidence concerning his claim for damages and fees because that evidence was not contained in the administrative record. Citing Seattle-First National Bank v. Kawachi, 91 Wash.2d 223, 226, 588 P.2d 725, 727 (1978) for the proposition that under Washington law res judicata precludes relitigation only of "matter[s] which could and should have been litigated in the [previous] action," Punton contends he is therefore free to seek general damages and fees in a separate action.

Without the benefit of the thinking of Judges Wright and Goodwin on this issue of Washington law, I am inclined to agree

with Punton that the district court's judgment should be affirmed. First, when a Washington court grants a writ of certiorari to review the decision of an administrative tribunal, the court's jurisdiction is quite limited in scope. "[T]he function of a writ of certiorari is to secure the rendition of 'the judgment which should have been rendered by the lower tribunal," Punton, 32 Wash.App. at 970, 650 P.2d at 1144 (quoting Bringgold v. Spokane, 19 Wash. 333, 336, 53 P. 368, 369 (1898)). Because of this limited appellate function "the relief granted under the writ may be only that which is necessary to set aside action in excess of 'the jurisdiction of [the] tribunal, board or officer, or [is illegal] (sic)' or to 'correct any erroneous or void proceeding, or a proceeding not according to the course of the common law.'" Id. (quoting Wash.Rev.Code § 7.16.040). See Bringgold

v. Spokane, 19 Wash. at 336, 53 P. at 369 (police commission lacked jurisdiction to assess costs against the losing party and therefore superior court similarly lacked jurisdiction to do so upon review pursuant to writ of certiorari). In this case the jurisdiction of the Safety Commission was "confined to the determination of the question of whether [the] removal, suspension, demotion, or discharge was made in good faith for cause." Seattle Municipal Code § 4.08.100A. Consequently, the superior court could not have awarded damages for pain and suffering or fees. See Punton, 32 Wash.App. at 970, 650 P.2d at 1144 (superior court may not award attorneys' fees in certiorari proceeding because administrative tribunal lacked authority to award fees).

Moreover, under Washington law a superior court acting pursuant to a writ

of certiorari is limited to the administrative record when adjudicating a dispute. It can neither hear witnesses nor receive evidence. Carleton v. Board of Police Pension Fund Commissioners, 115 Wash. 572, 197 P. 925 (1921). See also Chaussee v. Snohomish County Council, 38 Wash.App. 630, 644-45, 689 P.2d 1084, 1095 (1984) (superior court had jurisdiction to consider issue of equitable estoppel not considered by administrative tribunal below but properly concluded it could not decide issue because administrative record was inadequate); Bay Industry, Inc. v. Jefferson County, 33 Wash.App. 239, 240-41, 653 P.2d 1355, 1357 (1982). The record of the administrative procedding below does not contain the evidence concerning Punton's alleged pain and suffering that Punton presented to the federal district court in his § 1983 action. Because the superior court was

precluded under Washington law from hearing the evidence necessary to assess Punton's damages, the court could not award him in its certiorari proceeding the relief which he now seeks in his second action.

The City responds that, even if the Washington superior court had no jurisdiction in the certiorari proceeding to award damages and fees, Punton could have presented a claim for damages and fees in an action at law and joined it to his certiorari proceeding. Appellant's Opening Brief, at 11-12. The City cites no authority for this contention, and I find the argument unpersuasive. It would make little sense for Washington to design a special certiorari proceeding to streamline review of administrative adjudications and then permit plaintiffs to join cumbersome damage actions to their appeal.

The City bases its contention on the Washington Supreme Court's statement in Standow v. Spokane, 88 Wash.2d 624, 632, 564 P.2d 1145, 1150 (1977) that "[f]iling an action for damages does not preclude the subsequent issuance of a writ of certiorari in the same cause, upon a proper showing, where relief in the way of damages is inadequate as it is here." Reliance on this language seems to me to be misplaced. The court in Standow made this statement while addressing a claim that the plaintiff was not entitled to a writ of certiorari because in an earlier action he had sought damages, and certiorari is only available when there is no adequate remedy at law. See Wash.Rev.Code § 7.16.040. The court apparently intended merely to indicate that a party filing a damages action is not precluded from later seeking a writ of certiorari if she can demonstrate that the damage remedy is

inadequate. The statement seems to support Punton's position: an action for damages and certiorari proceeding are two separate actions which can be brought subsequent to one another by litigants in the Washington state court system. Standow does not say that the two actions can be joined in a single proceeding.

It therefore seems to me that, according to Washington res judicata law, Punton would not be barred from bringing a § 1983 action for damages and fees in state court, and hence he is not precluded from doing so in federal court according to Migra.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DELMUS PUNTON,
Plaintiff-Appellee/Cross-Appellant,

vs.

THE CITY OF SEATTLE,
Defendant-Appellant/Cross Appellee.

Nos. 83-3890, 83-4132.
CV-82-397-C

JUDGMENT

APPEAL from the United States District Court for the _____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court of the WESTERN District of WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and

hereby is REVERSED; THE CROSS-APPEAL IS DISMISSED AS MOOT. Neither party to recover costs.

Filed and entered 12/9/86

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DELMUS PUNTON,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. C82-397C

ORDER ON MOTIONS

THIS MATTER comes on for consideration on the cross motions of the parties. Neither party has requested oral argument. At issue is the preclusive effect of plaintiff's hearing and appeal from the Seattle Public Safety Civil Service Commission. The hearing board determined that plaintiff had been properly terminated. Upon a writ of certiorari, the King County Superior Court found that plaintiff's termination violated due process and ordered his reinstatement plus

back pay. The court of appeals affirmed. Punton v. Seattle Public Safety Commission, 32 Wn. App. 959 (1982). Defendant contends that the present action is barred by plaintiff's prior suit. Plaintiff asserts that the issue of liability under 42 U.S.C. § 1983 has been established but that the question of damages remains open for litigation.

Res judicata bars all grounds for recovery which could have been asserted in a prior suit between the same parties on the same cause of action. Ross v. International Brotherhood of Electrical Workers, 634 F.2d 453, 457 (9th Cir. 1980). The rule is the same for federal constitutional claims which could have been asserted in the first proceeding, see Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976), and includes § 1983 claims. See Gallagher v. Frye, 631 F.2d 127 (9th Cir.

1980). Res judicata will not, however, preclude relitigation of matters the first tribunal did not have jurisdiction to consider. See Ross, supra; Restatement (Second) of Judgments, § 26(1)(c) (1982).

Pursuant to its statutory authority, the Seattle Civil Service Commission had jurisdiction to order reinstatement and back pay. RCW 41.12.090. It did not have jurisdiction to award attorneys' fees or damages other than reinstatement plus back pay. Under a writ of certiorari, the King County Superior Court acted as an appellate court and only had the jurisdiction of the tribunal below. See RCW 7.16.040; Punton, supra. Although plaintiff could have filed a separate action in the superior court to obtain additional relief, see Standow v. Spokane, 88 Wn.2d 624, 632 (1977), he was under no obligation to do so. Nor could the Seattle Civil Service Commission consider the

additional claims. As such, the doctrine of res judicata does not preclude the plaintiff from litigating those claims for relief which the commission was without jurisdiction to remedy, especially where plaintiff did no more than exhaust his administrative remedies.

For the above stated reasons, the plaintiffs motion for partial summary judgment is GRANTED and the defendant's motion for summary judgment is DENIED. Defendant is hereby precluded from relitigating the state courts' findings that defendant violated plaintiff's constitutional rights. The issue of damages, other than reinstatement and back pay, and attorneys' fees remain open for litigation.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 6th day of May, 1983.

s/John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF WASHINGTON

DELMUS PUNTON,
Plaintiff,

vs.

THE CITY OF SEATTLE,
Defendant.

Civil Action File No. C82-397C

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury. Honorable John C. Coughenour, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged that judgment is hereby entered in favor of the plaintiff in the sum of $150,000.00.

Dated at Seattle, Washington, this 13th day of June, 1983.

s/
Deputy Clerk of Court

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DELMUS PUNTON,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

NO. C82-397C

DESIGNATION OF ISSUES AND
RECORD ON APPEAL
FRAP 10(b)

I. Record

The appellant City designates the following portions of the transcript which it intends to include in the record on appeal in the above-entitled case:

Docket Entry Number	Document
1	Complaint
2	Answer
25	Motion, Plaintiff's for Summary Judgment

Docket Entry Number	Document
26	Motion, Defendant's for Summary Judgment
27	Memorandum in Support of Motion
28	Notice of Motion
29	Affidavit of S.R. Sampson in Support of Motion
30	Certificate of Form of State Court Record (and attached records)
31	Reply, Plaintiff's, to defendant's Motion for Summary Judgment
32	Reply, defendant's in Support of its Motion For Summary Judgment
33	Notice of Motion, May 6, 1983, plaintiff's Instruction re: Motion for Summary Judgment
34	Supplemental Memorandum, plaintiff's re: Summary Judgment

Docket Entry Number	Document
36	Order on Motions, plaintiff's motion for partial summary judgment is granted and defendant's motion for summary judgment is denied
37	Motion of defendant's for Reconsideration, or, alternatively for Amendment permitting appeal
38	Memorandum in Support of Motion for Reconsideration, etc.
43	Memorandum of Plaintiff re: Reconsideration
51	Reply, Defendant's in Motion for Reconsideration
52	Memorandum, plaintiff's, re: defendant's reply in Motion for Reconsideration
55	Order denying defendant's Motion for Reconsideration, etc.
85	Verdict

Docket Entry Number	Document
87	Judgment on Jury Verdict
89	Notice of Appeal
----	Trial Court Docket Sheet

II. Issue

The appellant City intends to present the following issue on appeal:

Where the plaintiff has the opportunity in state court to sue for general, as well as special damages arising out of a single incident, does res judicata bar a subsequent lawsuit, for further damages, in the federal forum?

III. Notice of Limited Record

This designation and statement of issues is made pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure to notify the Clerk of the above Court, The United States Court of Appeals for the Ninth Circuit, and the Appellee Punton

herein, that the appellant City does not intend to include the entire transcript in the record on appeal in this case.

Dated this 27th day of June, 1983.

DOUGLAS N. JEWETT
City Attorney

By Susan R. Sampson
SUSAN R. SAMPSON, Assistant
Attorneys for Appellant

APPENDIX G

BEFORE THE PUBLIC SAFETY CIVIL SERVICE COMMISSION OF THE CITY OF SEATTLE

In the Matter of the Appeal of Delmus Punton from his discharge from the Seattle Police Department	)))))	Findings, Conclusions and Order of the Public Safety Civil Service Commission

I. Summary of Proceedings

THIS MATTER came on regularly for hearing before the City of Seattle Public Safety Civil Service Commission on March 11 and 19, 1981. The appellant, Delmus Punton, appeared in person and was represented by Lawrence Linville, Attorney. The City of Seattle Police Department was represented by Douglas N. Jewett, Seattle City Attorney, through Susan Rae Sampson, Assistant City Attorney. Witnesses for the Police Department were Phillip W. Williams, Terry Lee Williams, Craig Arrowood, Ronald Hinkle, Esther Kimura, Connie Nakashima, Lt. Michael O'Mahony, Sgt. Patrick Moriarty, Officer Gary J. McNulty, Officer Peter Dornay, Delmus

Punton, Sgt. Fred Hill. Sgt. Ted Jensen, Sgt. Gene Doman, Sgt. Michael R. Germann, and Major Dean Olson. Witnesses for the appellant were Officer David J. Murray, Sgt. Gerald E. Pluth, Sgt. Douglas M. Dills, Officer Peter G. Dornay and the appellant.

Testimony and documentary evidence having been received and evaluated, the Commission now makes the following findings of fact, conclusions of law and order.

II. Findings of Fact

1. On June 29, 1980, Seattle Police Officer Delmus Punton, while on duty, permitted two unauthorized riders to ride in his patrol vehicle, in violation of Seattle Police Manual Section 1.11.126, part 2.

2. On or about June 6, 1980, Sgt. Moriarty ordered Delmus Punton not to permit unauthorized riding in his patrol

vehicle. His violation of that order on June 29, 1980, constituted disobedience of the direct, lawful order of a supervisor, in violation of Seattle Police Manual Section 1.08.040.

3. On June 29, 1980, Delmus Punton stopped his patrol vehicle on a sidewalk, and, from that position, permitted a novelty sound track to be broadcast over the public address system of his patrol vehicle. Further, in doing so, he permitted the recording to be broadcast on the Police Dispatcher's radio frequency, causing the Dispatcher's concern for the safety of his unit and other police units in the area. While doing so, he failed also to respond to communications from his Lieutenant. These acts, together and individually, constitute conduct unbecoming a Police Officer, in violation of Seattle Police Department Manual Section 1.08.010.

4. On June 29, 1980, while on duty, Seattle Police Officer Delmus Punton used unnecessary and unreasonable force to remove Phillip Williams from the emergency entry area of Providence Medical Center, in violation of Seattle Police Department Manual Section 2.09.070.

5. Prior to June 29, 1980, Delmus Punton had received the following disciplinary actions:

1973 - Written reprimand regarding Police procedures

1979 - Written reprimand for permitting unauthorized riders in a Police vehicle

1979 - Suspension for 5 days for conduct unbecoming a Police Officer, for using information gained under color of police authority to approach a young woman for his personal purposes.

6. The Chief of Police discharged Delmus Punton based on the violations set forth in Findings Nos. 1 through 4, and on the basis of his prior disciplinary record.

7. Delmus Punton made a timely appeal of his discharge to the Seattle Public Safety Civil Service Commission.

III. Conclusions of Law

1. The Seattle Public Safety Civil Service Commission has jurisdiction over the parties and subject matter of this proceeding.

2. The discharge of Delmus Punton from the Seattle Police Department was done in good faith, and for cause.

IV. Order

1. The order of the Chief of Police discharging Delmus Punton from the Seattle Police Department is hereby sustained.

Signed at Seattle, Washington this 8th day of April, 1981.

PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE

s/_____
David C. Garcia, Chairman

s/_____
David W. Grayson

s/_____
Donald D. Haley

APPENDIX H

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

DELMUS PUNTON,
Plaintiff,

v.

CITY OF SEATTLE CIVIL SERVICE
COMMISSION (PUBLIC SAFETY),
Defendant.

NO. 81-2-08406-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came on for hearing before the Honorable Robert M. Elston, Judge of King County Superior Court, on the 9th day of October, 1981. The petitioner, Delmus Punton, was represented by Clinton, Fleck, Glein & Linville, Lawrence B. Linville. The respondent, City of Seattle Public Safety Civil Service Commission, was represented by the City Attorney's office, Susan Rae Sampson.

This matter was presented on the basis of a Writ of Certiorari to the City of Seattle Public Safety Commission,

directing that Commission to certify its complete record in this matter to the King County Superior Court for review pursuant to RCW 7.16.120. The written record consisted of 296 pages of recorded testimony, together with exhibits. Some exhibits bore numbers. Exhibits which were numbered nos. 1 - 5, 7 - 10, 12 - 13, and 15 - 18 were reviewed by the court. One unnumbered exhibit was mutually identified by counsel as Waiver forms which should have been marked as Exhibit No. 11. Missing exhibits nos. 6 and 14 were mutually identified by counsel as a voice box and a radio transmission tape respectively. Neither party sought production of the missing exhibits, and no contention was made to the court that the absence of these exhibits was either material or prejudicial.

In addition to the numbered exhibits, many exhibits bore no numbers or special

marking by the Commission below. Neither party has suggested that these unmarked exhibits were improperly certified by the Commission below, or were not otherwise properly before the court.

In addition to the exhibits certified by the Commission below, counsel have submitted legal briefs and written argument to the court. In most instances, counsel have appended additional records or materials to their briefs. Counsel have offered these supplemental records or materials in an effort to assist the court in its review of the record below, which has been characterized by counsel as perhaps being "flat". Both counsel have stipulated that these materials are properly before the court and have further agreed that the court may consider such materials in reaching its decision.

FINDINGS OF FACT

1. On September 22, 1980, the Chief of Police dismissed Delmus Punton, Seattle police officer, for conduct unbecoming an officer, disobedience of a superior order, allowing unauthorized persons to ride in his patrol vehicle, using unnecessary force in detaining a citizen for identification, and a prior adverse disciplinary record.

2. Subsequent to dismissal, two Disciplinary Hearing Panels reviewed Delmus Punton's discharge. One panel heard charges brought by a civilian: The other panel heard intra-departmental charges. The Panels unanimously sustained three of four charges, and recommended that Delmus Punton be returned to active service as a Seattle police officer following a period of suspension from duty. The recommendation was communicated to the Chief of Police.

3. On January 19, 1981, the Chief of Police reviewed the recommendation of the Disciplinary Hearing Panel, but did not accept the recommendation. Rather, the Chief of Police affirmed his earlier decision to dismiss Delmus Punton from the Seattle Police Department.

4. Appeal was timely taken by Delmus Punton to the City of Seattle Public Safety Civil Service Commission. On March 11th and 19th, 1981, the Commission heard Delmus Punton's appeal. On April 8, 1981, the Commission denied Officer Punton's appeal, and on May 13, 1981, the Commission also denied Delmus Punton's Motion for Reconsideration.

5. On July 8, 1981, Delmus Punton filed an Application for Writ of Certiorari, together with an Order to Show Cause, directed to the City of Seattle to appear before the Presiding Judge of the King County Superior Court on July 17,

1981, to "then and there show cause if any there be, why the Writ of Certiorari should not issue". On July 17th, the City of Seattle appeared before the Presiding Judge, and did not oppose issuance of the Writ of Certiorari. The record was subsequently prepared and certified to this court for review on October 9, 1981.

6. Regarding each of the five grounds upon which the Chief of Police dismissed Delmus Punton, there exists substantial evidence in the record to support the dismissal.

7. With specific regard to the charge of conduct unbecoming an officer, Delmus Punton's conduct on June 29, 1980, so clearly breached that standard that it would be unreasonable to assume or find that Delmus Punton should or would not have foreseen that his conduct on June 29, 1980 was unbecoming.

8. The Police Manual is the operating guide of the Seattle Police Department. The manual provides that a Seattle police officer, accused of wrongful conduct and accordingly facing possible disciplinary measures, shall be given a pretermination hearing before disciplinary measures are decided or implemented.

9. The Collective Bargaining Agreement between the City of Seattle and the Seattle Police Officers' Guild, the certified bargaining agent for all sworn police officers up to and including the rank of sergeant, provides for a pretermination hearing in cases of discipline of a Seattle police officer.

10. Delmus Punton was a permanent civil service employee, and his employment with the City of Seattle could only be terminated for cause. As such, he had an expectation of continued employment with

the City of Seattle as a sworn Seattle police officer.

11. By the very terms and circumstances under which Delmus Punton was discharged as a Seattle police officer, he has been stigmatized with the result that the circumstances of his dismissal have adversely affected his abilities to seek and obtain gainful employment elsewhere.

12. Delmus Punton was not given a pretermination hearing of any sort whatsoever.

13. Plaintiff's counsel has spent a total of 51.93 hours in representing Officer Punton before the City of Seattle Public Safety Civil Service Commission, at the rate of $70.00 per hour. Plaintiff's counsel has spent a total of 139.75 hours representing Officer Punton before the King County Superior Court, at the hourly rate of $85.00 per hour. The case is one of initial impression to this court, the

case was well-prepared and well-presented by plaintiff's counsel, a beneficial result was obtained for the client, plaintiff's counsel received no aid or assistance from any source other than his own labor, the case was taken on an hourly fee basis, modestly difficult questions of constitutional law were involved, and the case was vigorously defended by the City of Seattle.

CONCLUSIONS OF LAW

1. This court has both subject matter jurisdiction and personal jurisdiction over the parties.

2. There exists substantial evidence to support each of the five stated grounds for Delmus Punton's discharge.

3. The Police Manual and relevant Collective Bargaining Agreement provisions provide the right to a pretermination hearing for Delmus Punton.

4. Because a pretermination hearing is intended to assure the Chief of Police access to all information before a decision is reached and discipline implemented, the omission of pretermination hearing cannot be subsequently cured by a post-termination hearing in this case.

5. Delmus Punton's expectation of continued employment with the City of Seattle is a property interest protectable by due process.

6. Delmus Punton's interest in his good name and ability to freely seek gainful employment [e]lsewhere is a liberty interest protectable by due process.

7. Neither contention nor evidence was presented to the court which would warrant omission of a pretermination hearing in this case.

8. Omission of a pretermination hearing violated Delmus Punton's State and

U.S. Constitutional rights to due process of law.

9. The hourly rate charged by plaintiff's counsel is reasonable and the hours expended are reasonable.

DATED this 2nd day of December, 1981.

s/
Robert M. Elston, Judge

Presented by:

CLINTON, FLECK, GLEIN & LINVILLE

By s/
Lawrence B. Linville
Attorneys for plaintiff

APPENDIX I

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

DELMUS PUNTON,
Plaintiff,

v.

CITY OF SEATTLE CIVIL SERVICE
COMMISSION (PUBLIC SAFETY),
Defendant.

NO. 81-2-08406-1

ORDER OF REINSTATEMENT

THIS MATTER having been tried before the court on October 16, 1981, the court having reviewed the certified record, reviewed the briefs and arguments of counsel, having entered its Findings of Fact and Conclusions of Law, and otherwise being full advised, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

Delmus Punton is ordered reinstated to the Seattle Police Department, effective September 22, 1980.

II.

The personnel records of Delmus Punton on file with the Seattle Police Department, shall be corrected to indicate that his termination was reversed by the King County Superior Court as contravening procedural due process.

III.

Delmus Punton shall have ten (10) days from the date of this Order to report for duty.

IV.

Delmus Punton is awarded prejudgment interest, at eight percent (8%), on all compensation accrued from September 22, 1980 through the date of this Order.

V.

Delmus Punton is awarded attorney's fees in the amount of $15,000.00.

The provisions of this order shall be stayed until December 31, 1981.

DATED this 2nd day of December, 1981.

s/Robert M. Elston
JUDGE

Presented by:
CLINTON, FLECK, GLEIN & LINVILLE

By s/
Lawrence B. Linville
Attorneys for Plaintiff

APPENDIX J

32 Wash.App. 959

Delmus PUNTON, Respondent,

v.

CITY OF SEATTLE PUBLIC SAFETY COMMISSION, Appellant.

No. 11072-1-I.

Court of Appeals of Washington, Division 1.

Sept. 15, 1982.

Rehearing Denied Oct. 15, 1982.

JAMES, Judge.

The Seattle Public Safety Civil Service Commission (Commission) appeals from a superior court order in a certiorari proceeding, reinstating Delmus Punton as an officer of the Seattle Police Department. We affirm in part and reverse in part.

Following an investigation of several incidents occurring during June 1980, the Seattle Police Chief on September 22 dismissed Punton based upon charges of

conduct unbecoming an officer, disobedience of a superior's order, allowing unauthorized persons to ride in his patrol car, and using unnecessary force in detaining a citizen for identification purposes. Dismissal was imposed in light of Punton's prior adverse disciplinary record.

Punton was not advised of the charges or afforded a hearing at any time before receiving his notice of dismissal. The Chief's decision was reviewed by disciplinary panels within the Department. The panels sustained three of the specific charges but recommended suspension instead of dismissal. The Chief reviewed the panels' recommendation and adhered to his earlier decision to dismiss Punton.

Punton filed an appeal with the Commission, whose hearings are "confined to the determination of the question of

whether [the] removal, suspension, demotion, or discharge was made in good faith for cause." Seattle Municipal Code § 4.08.100A. Punton there argued that the failure to provide a pretermination hearing rendered his discharge constitutionally invalid. The Commission concluded that Punton's dismissal was made in good faith for cause and affirmed the Chief's decision.

Punton next obtained a writ of certiorari, alleging that his discharge "was not in good faith, nor for cause, nor in conformance with due process." Punton again pressed his argument that failure to provide a pretermination hearing denied him due process and also argued that the Chief's action constituted a violation of 42 U.S.C. § 1983,[1] although he filed no pleading relying upon § 1983.

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[1] 42 U.S.C. § 1983 provides, in pertinent part:

The trial judge found that substantial evidence supported the dismissal on each of the five grounds upon which the Chief relied. The trial judge concluded, however, that a pretermination hearing was required by the Department's manual and by the collective bargaining agreement between the City and the Seattle Police Officers' Guild. The trial judge further concluded:

> 4. Because a pretermination hearing is intended to assure the Chief of Police access to all information before a decision is reached and discipline inplemented, the omission of a pretermination

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[1] cont.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

hearing cannot be subsequently cured by a post-termination hearing in this case.

5. Delmus Punton's expectation of continued employment with the City of Seattle is a property interest protectable by due process.

6. Delmus Punton's interest in his good name and ability to freely seek gainful employment [e]lsewhere is a liberty interest protectable by due process.

7. Neither contention nor evidence was presented to the court which would warrant omission of a pretermination hearing in this case.

8. Omission of the pretermination hearing violated Delmus Punton's State and U.S. Constitutional rights to due process of law.

Conclusions of law 4-8. The trial judge ordered Punton's reinstatement to the Seattle Police Department, with back pay, and ordered that Punton's personnel records be "corrected" to indicate his termination was reversed by the Superior Court as contravening procedural due process. The trial judge also awarded

Punton attorney's fees for the administrative and Superior Court proceedings under authority of 42 U.S.C. § 1988.[2]

The Commission first contends that the trial judge exceeded the permissible scope of review permitted in certiorari proceedings. Relying upon Olson v. University of Washington, 89 Wash.2d 558, 573 P.2d 1308 (1978), the Commission argues that where, as here, administrative action is appealable to a reviewing body and that body's review is statutorily limited, the trial judge can review by certiorari only the proceedings before the reviewing body and may not consider the

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[2] 42 U.S.C. § 1988 provides, in pertinent part:

"In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

original action. Assuming that the Commission's determination was proper within its sphere (i.e., the discharge was "made in good faith for cause", Seattle Municipal Code § 4.08.100A), review of Punton's remaining contentions by writ of certiorari would be precluded. We do not agree.

The questions which are to be determined by the trial judge in a proceeding under a statutory writ of certiorari include:

> (2) Whether the authority, conferred upon the body or officer in relation to the subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.
>
> (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

RCW 7.16.120(2), (3).

Allegations that a body or officer charged with decision-making authority

failed to comply with its governing rules or regulations promulgated pursuant to its rule-making authority or acted in an unconstitutional manner are properly before the superior court pursuant to RCW 7.16.120(2) and (3). Moreover, "[t]he superior court also has power, under article 4, sections 1 and 6 of our state constitution, to review by writ of certiorari judicial and nonjudicial actions of an administrative agency." King County v. State Board of Tax Appeals, 28 Wash.App. 230, 237, 622 P.2d 898 (1981). Thus, the courts possess inherent appellate jurisdiction to determine if agency action was illegal and violative of fundamental rights. Williams v. Seattle School Dist. 1, 97 Wash.2d 215, 643 P.2d 426 (1982); Mentor v. Nelson, 31 Wash.App. 615, 644 P.2d 685 (1982).

If an intermediate or reviewing administrative body is empowered to

determine only certain narrow issues, this establishes only that a plaintiff does not obtain review of other issues relating to procedurally improper, illegal, or unconstitutional action which he may raise under RCW 7.16.040 and RCW 7.16.120 before initiating proceedings in superior court. The legislature has not restricted the scope of the statutory writ of certiorari when the intermediate administrative body has a limited scope of review, and the courts will not imply such a limitation.

Olson v. University of Washington is not to the contrary. There, formal disciplinary proceedings were instituted after the officer decided to reject an informal disciplinary procedure proposed by his chief. His due process claim was predicated solely on the alleged impropriety of that proposal. Unlike here, in Olson there was no contention

> That the procedures followed by the University and the [Higher Education Personnel Board] were improper. . . . No nexus between the conduct of [the Chief] questioned here and the Board's affirmance of the University's decision to dismiss respondent [was] shown.

Olson v. University of Washington, supra 89 Wash.2d at 563, 573 P.2d 1308.

The Commission next contends that Punton has no constitutional right to a pretermination hearing under the due process clauses of the federal or state constitutions, and that no right to a pretermination hearing is granted by the Department's regulations or the collective bargaining agreemnt. The Commission argues, then, that the trial judge erred in concluding Punton was deprived of a property right without due process of law. We do not agree.

To determine if due process requirements apply, it must first be established that the plaintiff was deprived of an interest which can be characterized as

"property" or "liberty." Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Commission concedes that, as a permanent civil service employee who could be discharged only for cause, Punton possessed a property right in his continued employment.[3]

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[3] This is in accord with our decisions in Ticeson v. Department of Social & Health Servs., 19 Wash.App. 489, 576 P.2d 78 (1978), and Helland v. King County Civil Serv. Comm'n, 10 Wash.App. 683, 685 n.1, 519 P.2d 258 (1974), rev'd on other grounds, 84 Wash.2d 858, 529 P.2d 1058 (1975). Accord, Arnett v. Kennedy, 416 U.S. 134, 155, 177, 209, 94 S.Ct. 1633, 1644, 1655, 1671, 40 L.Ed.2d 15 (1974). See Ritter v. Board of Comm'rs, 96 Wash.2d 503, 509, 637 P.2d 940 (1981), quoting Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972) ("A due process property interest exists 'if there are such rules or mutually explicit understandings that support [an individual's] claim of entitlement to the benefit and that he may invoke at a hearing.'"). But cf. Willaims v. Seattle School Dist. 1, 97 Wash.2d 215, 643 P.2d 426 (1982); Giles v. Department of Social & Health Servs., 90 Wash.2d 457, 583 P.2d 1213 (1978) (no property right in public employment).

Next it must be determined what "process" is "due"; here, whether a pretermination hearing was required. Mathews v. Eldridge, 424 U.S. 319, 332-33, 96 S.Ct. 893, 901-02, 47 L.Ed.2d 18 (1976). In Ticeson v. Department of Social & Health Servs., 19 Wash.App. 489, 576 P.2d 78 (1978), we held that the dismissal of a permanent civil service employee in compliance with RCW 41.06.170 did not deprive her of procedural due process with respect to her property right to continued public employment. The procdeures established by RCW 41.06.170 are substantially identical to those followed in Punton's case, for RCW 41.06.-170 affords neither a right to a pretermination hearing nor a right to predismissal notice of the charges.[4] As a

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[4] RCW 41.06.170(2) provides:

"Any employee who is reduced, dismissed, suspended, or demoted, after completing his probationary period of

matter of constitutional law, Ticeson is dispositive of Punton's due process claims concerning his property right to continued public employment unless, as we herein conclude, the Department has adopted more stringent requirements and the failure to follow those requirements amounts to a deprivation of due process.[5]

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[4] cont.

service as provided by the rules and regulations of the board . . . shall have the right to appeal to the personnel appeals board created by RCW 41.64.010 not later than thirty days after the effective date of such action. The employee shall be furnished with specified charges in writing when a reduction, dismissal, suspension, or demotion action is taken. Such appeal shall be in writing."

[5] Although resolution of this case on nonconstitutional grounds might have been possible, see Williams v. Seattle School Dist 1, supra 97 Wash.2d at 222-23, 643 P.2d 426, Wilson v. Nord, 23 Wash.App. 366, 597 P.2d 914 (1979), the parties have elected to present this case to the trial judge and to this court solely on constitutional grounds.

Pursuant to article 6, section 4 of the Seattle City Charter, the Police Department promulgated its Manual of Rules and Procedures (hereinafter Manual). Its provisions "are to be observed continuously by the entire Department." Manual § 1.01.010.

When a complaint against an officer is received, investigated, and "classified as being sustained", the Manual specifies the following procedures:

> 3) The accused is notified immediately and in writing.
>
> a) When disciplinary action is intended by the Chief of Police, he shall ensure that the accused is immediately notified of the intended discipline and of his rights to a disciplinary hearing if such exists.
>
> Except in those cases where felony charges will be requested, the accused has 48 hours . . . to waive or exercise his right to a disciplinary hearing. . . . If the accused exercises his right to a disciplinary hearing or a board is convened despite waiver, he shall have adequate time to

> prepare his defense after he has been fully informed of the nature of the charges that have been lodged against him. This shall not interfere with the authority of the Chief of Police to suspend accused employees pending completion of review by the disciplinary hearing panel.
>
> . . . .
>
> c) The Chief of Police will implement the disciplinary action with the assistance of the accused's commanding officer.

Manual § 1.09.040(4)(c)(3)(a), (c). After the hearing panel renders its decision, "[t]he accused will be advised . . . of the results . . . and provided with a copy of the panel's recommendations prior to implementation of any disciplinary action that may be recommended." Manual § 1.09.040(7)(d).

Granting the accused 48 hours to exercise or waive "his right to a disciplinary hearing" and guaranteeing adequate

time to prepare if "his right to a disciplinary hearing" is exercised are tantamount to an express declaration that a right to a disciplinary hearing exists.

As to the timing of this disciplinary hearing, the accused must be notified of "his right to a disciplinary hearing" and notified of the discipline at a time when it is "intended." "[I]ntended" discipline is discipline not yet imposed. Provision for the accused's receipt of the disciplinary panel's recommendations "prior to any disciplinary action that may be recommended", Manual § 1.09.040(7)(d), also supports Punton's contention that a pretermination hearing was required.

Specific reservation of the Chief's authority to suspend accused officers during the pendency of a disciplinary hearing extends no authority to impose the more severe penalty of discharge during this period. The express mention of one

thing is indicative of intent to exclude other things not expressed. E.g., Dominick v. Christensen, 87 Wash.2d 25, 548 P.2d 541 (1976).

The Commission cites a provision that "[t]he Chief of Police will review all investigations into misconduct of department personnel and take such action as he deems appropriate in each individual case", Manual § 1.09.030(2)(a), in support of its position that no pretermination hearing was required. But this provision does not address when the disciplinary action is to be taken. Given the advisory nature of recommendations by the disciplinary hearing panels, delay in discharging employees until after the hearing does not impinge on the Chief's ultimate authority to "take such action as he deems appropriate". The Commission also presents various reasons justifying quick disciplinary action, e.g., alleged danger

to the public. These reasons could support a suspension "pending completion of review by the disciplinary hearing panel" but do not establish the necessity for or propriety of a discharge. We agree with the trial judge that the Department's regulations required a pretermination hearing.

Disregard of an adminisitrative regulation may constitute a denial of procedural due process. Taylor v. Franzen, 93 Ill.App.3d 758, 48 Ill.Dec. 840, 417 N.E.2d 242 (1981). But there is no general due process right to have states adhere to procedural rules which they establish. Insofar as state procedural rules may impose requirements beyond those required by constitutional standards, a violation of such rules is not per se a denial of due process. Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980); United States v. Jiles, 658 F.2d

194 (3d Cir. 1981); Cofone v. Manson, 594 F.2d 934 (2d Cir. 1979); Taylor v. Franzen, supra; Adamchek v. Board of Educ., 174 Conn. 366, 387 A.2d 556 (1978); King v. Hilton, 525 F.Supp. 1192 (D.N.J. 1981); Morrow v. Bassman, 515 F.Supp. 587 (S.D.Ohio 1981); see United States v. Caceres, 440 U.S. 741, 751-53, 99 S.Ct. 1465, 1471-72, 59 L.Ed.2d 733 (1979) (violation of Internal Revenue Service investigation procedural regulations raises no due process questions where defendant neither relied on agency regulations promulgated for his guidance or benefit nor suffered substantially because of their violation).[6]

---

[6] Although the failure to follow applicable procedural rules is most often analyzed in terms of a deprivation of a "liberty" interest, see, e.g., Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980), a failure to follow procedural rules which is closely associated, as here, with the

State regulations which impose limits on state authority or confer a substantive right create interests protected by due process, however. In contrast, regulations which merely establish procedures by which the decision-maker is to exercise his authority give rise to no due process protections. Cofone v. Manson, supra; United States v. Jiles, supra; contra, Bills v. Henderson, supra at 1293 (no "liberty" interest is created by state regulations). Some regulations may entail both procedural and substantive aspects, King v. Hilton, supra, so this distinction is not necessarily easy to apply. But if such regulations establish a procedure for deprivation of a property right, the employee-claimant has a substantial

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6 cont.

deprivation of a "property" right could logically be analyzed as an infringement of a "property" right.

interest in having those procedures followed. We consider the test stated in Cofone and Jiles to provide a more appropriate level of protection for this substantial interest and therefore apply it here.

The regulations grant a substantive right to a pretermination hearing. The regulations also limit the Chief's authority, pending the disciplinary hearing, to ordering suspension of the officer. The regulations therefore establish elements of a substantive "property" interest. Violation of the regulations gives rise to a prima facie deprivation of due process.

We recognize that certain de minimis deprivations of "liberty" or "property" are not constitutionally cognizable, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). But the failure to provide a pretermination hearing cannot be

described as harmless or de minimis. As the trial judge concluded,

> [b]ecause a pretermination hearing is intended to assure the Chief of Police access to all information before a decision is reached and discipline implemented, the omission of a pretermination hearing cannot be subsequently cured by a post-termination hearing in this case.

Conclusion of law 4. An employee in Punton's situtation has significant interest in having his case heard by a neutral panel and having the record therein considered by the ultimate decision-maker without any burden of persuading that decision-maker to set aside a prior summary determination.

We conclude that Punton was denied due process of law when the Department failed to provide a pretermination hearing according to its regulations. Accordingly, we affirm that portion of the judgment which orders his reinstatement and awards back pay with interest thereon.

The Commission also contends that the trial judge erred by concluding that Punton was deprived of a "liberty" interest because he was discharged without a pretermination hearing.[7] But the judgment herein does not depend upon the propriety of this conclusion. The order modifying Punton's personnel file to reflect reversal of his termination on due process grounds is consistent with our conclusion as to Punton's property rights and thus proper. Nor has Punton sought any additional relief in this action which

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[7] "[L]iberty, defined in part as the right of an individual to contract and to engage in an occupation," may be infringed if (1) the government dismisses an employee based on a charge that calls into question his good name, honor, or integrity, or (2) if the government's dismissal of the employee forecloses the employee's freedom to take advantage of other employment opportunities. Giles v. Department of Social & Health Servs., 90 Wash.2d 457, 461, 583 P.2d 1213 (1978). Accord, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

would require us to consider if he was denied a "liberty" interest. Accordingly, we do not address the issue.

The Commission next contends the trial judge erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988. We agree.

In proceedings pursuant to a writ of certiorari or review, a trial judge acts as an appellate court reviewing the propriety of administrative action. North Street Ass'n v. Olympia, 96 Wash.2d 359, 635 P.2d 721 (1981); Grays Harbor County v. Williamson, 96 Wash.2d 147, 634 P.2d 296 (1981). Punton's argument relying upon section 1983 did not change the nature of this proceeding. A similar issue concerning costs was considered in the early case of Bringgold v. Spokane, 19 Wash. 333, 336, 53 P. 368 (1898):

> [T]he undisputed rule of law is that the office of a writ of review is to enforce the judgment which should have been rendered by the lower tribunal. It is conceded that

> the police commission had no jurisdiction to adjudge costs in the proceedings which were had before it. That being true, the superior court was without jurisdiction upon the review to enter a judgment for the costs incurred in the trial before the police commissioners. Its jurisdiction could only go to the extent of rendering the judgment that should have been rendered by the lower tribunal.

Neither the Commission nor the disciplinary panels possessed authority to award attorney's fees incurred in their proceedings. It follows that the trial judge likewise lacked jurisdiction in a certiorari proceeding to award fees for such administrative proceedings. Bringgold v. Spokane, supra.

Given that the function of a writ of certiorari is to secure the rendition of "the judgment which should have been rendered by the lower tribunal," Bringgold v. Spokane, supra at 336, 53 P. 368, we perceive that the relief granted under the writ may be only that which is

necessary to set aside action in excess of "the jurisdiction of [the] tribunal, board or officer, or [is illegal]" or to "correct any erroneous or void proceeding, or a proceeding not according to the course of the common law." RCW 7.16.040. This is but an application of the rule that a writ of certiorari is designed to provide relief where there is no plain, speedy, and adequate remedy at law. RCW 7.16.040; State v. Cascade Dist. Court, 24 Wash.App. 522, 603 P.2d 1264 (1979). See also Standow v. Spokane, 88 Wash.2d 624, 564 P.2d 1145 (1977) (party may file action for damages and yet not be precluded from relief by certiorari).

The administrative bodies' failure to award attorney's fees was not error. The Superior Court did not correct any error below by awarding fees in the certiorari proceedings. We conclude that the trial judge erred in awarding

attorney's fees in the Superior Court proceedings as well as for the prior administrative proceedings.

Accordingly, the judgment is reversed as to attorney's fees and affirmed in all other respects.

CALLOW, J., concurs.

WARD WILLIAMS, J., concurs in the result.

APPENDIX K

PETITIONS FOR REVIEW

Punton, Respondent, v. Seattle Pub. Safety Comm'n, Petitioner, No. 49209-3. Petition for review of a decision of the Court of Appeals, September 15, 1982, 32 Wn. App. 959. Denied January 7, 1983.